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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE AUGUSTUS MOORE,

Defendant and Appellant.

B214413

(Los Angeles County Super. Ct.
No. BA346129)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Law Office of Gene Vorobyov and Gene D. Vorobyov, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Tyrone Augustus Moore guilty of attempted second degree robbery of Jorge Rodriguez (Pen. Code, §§ 664, 211).¹ Defendant waived his jury trial right and admitted the truth of the recidivist allegations that he suffered a prior conviction under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d) and served a prior prison term (§ 667.5, subd. (a)). Defendant was sentenced to seven years eight months in state prison.²

In this timely appeal, defendant contends the trial court prejudicially erred in failing to instruct sua sponte on the offenses of assault and battery, which he contends are lesser included offenses of attempted robbery. Concluding that assault and battery are not lesser included offenses of attempted robbery, we hold the court did not err in failing to instruct sua sponte on the offenses of assault and battery. Accordingly, we affirm the judgment.

STATEMENT OF FACTS

Prosecution Evidence

On September 7, 2008, at 10:00 p.m., Rodriguez was walking in the area of Figueroa and 41st Street. He walked past a group consisting of two men and two women. Defendant and a young man crossed the street and walked toward Rodriguez. Defendant and the young man then blocked Rodriguez's forward progress. Wanting to get away, Rodriguez forced his way past them and walked on, but they followed him, saying "nigga or nigger" and other things he could not understand.

Apprehensive, Rodriguez turned around to face them and asked what was going on. Defendant told Rodriguez, "'Give me what you have, give me everything you have'"

¹ Hereinafter, all statutory references will be to the Penal Code.

² Defendant was sentenced to the low term of 16 months for attempted robbery, doubled pursuant to the three strikes law, plus five years for the prior prison term enhancement.

and grabbed his hand. Defendant's companion thrust his hand into Rodriguez's right pocket and instructed Rodriguez to give him all his money, stating "I have a weapon." As defendant and his companion pulled on Rodriguez, they hit him in the chest with their fists. Defendant held Rodriguez in a bear hug while the companion punched him in the face. Rodriguez was very frightened of what might happen. Defendant and his companion were taller than Rodriguez. As Rodriguez tried to extricate himself, both defendant and the young man delivered two more blows to his face. Rodriguez broke free by dropping to the ground on one knee and ran away across the street before anything was taken from him. Defendant and his companion joined the four people Rodriguez had passed before being accosted. Defendant and his companion had no injuries; Rodriguez was visibly injured.

Interviewed by the police later that night, defendant stated a Hispanic male called him a name that was a racial slur, and in response, defendant "approached the Hispanic guy and they began to wrestle." When the wrestling was over, both parties walked away.

DISCUSSION

Defendant contends the trial court prejudicially erred in failing to instruct sua sponte on assault and battery, because there was substantial evidence to support conviction of the lesser offenses. He contends assault and battery are lesser included offenses of attempted robbery under the accusatory pleading test, because the pleading conjunctively charged that the robbery was committed by force *and* fear. We conclude assault and battery are not lesser included offenses of attempted robbery.

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.] This sua sponte obligation extends to lesser included offenses if the evidence "raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.'" [Citation.] [¶] We employ two alternative tests to determine whether a lesser offense is necessarily included in a greater offense. Under the

elements test, we look to see if all the legal elements of the lesser crime are included in the definition of the greater crime, such that the greater cannot be committed without committing the lesser. Under the accusatory pleading test, by contrast, we look not to official definitions, but to whether the accusatory pleading describes the greater offense in language such that the offender, if guilty, must necessarily have also committed the lesser crime.” (*People v. Moon* (2005) 37 Cal.4th 1, 25-26.)

““On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) “A battery is any willful and unlawful use of force or violence upon the person of another.” (§ 242.) “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.)

The amended information alleged: “On or about September 7, 2008, . . . the crime of attempted second degree robbery, in violation of Penal Code section 664/211, a felony, was committed by [defendant], who did unlawfully, and by means of force and fear³ take personal property from the person, possession, and immediate presence of [Rodriguez].”

In the language of Judicial Council of California Criminal Jury Instructions (2008-2009) CALCRIM No. 1600, the jury was instructed that, to establish that defendant was guilty of attempted robbery, the People were required to prove “the defendant used force or fear to attempt to take the property or to prevent the person from resisting.”

The contention that assault and battery are lesser included offenses of attempted robbery, under the accusatory pleading test, where the force or fear element of robbery in

³ “When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way.” (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532-1533.)

section 211 are plead in the conjunctive was rejected in *People v. Wright* (1996) 52 Cal.App.4th 203, 208-211 (“*Wright*”).⁴ The appellate court in *Wright* reasoned that “‘force’ is not an element of robbery independent of ‘fear’; there is an equivalency between the two. “[T]he coercive effect of fear induced by threats . . . is in itself a form of force, so that either factor may normally be considered as attended by the other.” [Citation.] [¶] . . . [¶] Since the element of force can be satisfied by evidence of fear, it is possible to commit a robbery by force without necessarily committing an assault. Consequently, under the ‘accusatory pleading’ test, assault is not necessarily included when the pleading alleges a robbery by force.” (*Id.*, at pp. 209-211.)

We agree with the holding in *Wright*. One may commit an attempted robbery through the use of fear, without committing a battery or an assault. The trial court did not err in refusing to instruct sua sponte on the lesser offenses.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

MOSK, Acting P. J.

FERNS, J.*

⁴ This issue was noted by our Supreme Court in *People v. Parson* (2008) 44 Cal.4th 332, 350, but it was not addressed on the merits.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.